BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: STOCKTON TRI INDUSTRIES, INC. P. O. Box 6097 Stockton, CA 95206 Employer	Docket No. 02-R5D1-4946 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board) pursuant to authority vested in it by the California Labor Code, having ordered reconsideration of the decision of the Administrative Law Judge (ALJ) in the above-entitled matter on its own motion makes the following decision after reconsideration.

JURISDICTION

From October 25 through November 1, 2002, a representative of the Division of Occupational Safety and Health (Division) conducted an inspection at a place of employment**,** a quarry, owned by ISP Mineral Inc., located at 1900 Highway 104, Ione, California (the site). On November 19, 2002, the Division cited Stockton Tri Industries, Inc. (Employer) alleging a serious violation of section 3314(d) [repairing equipment without effectively blocking or securing it against inadvertent movement] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations[1] and proposed a civil penalty of $12,600.

Employer filed a timely appeal challenging the penalty proposed by the Division.

On November 3, 2004, an Administrative Law Judge (ALJ) of the Board heard this case in Sacramento, California. The parties were given a full opportunity to present testimonial and documentary evidence, to examine and cross-examine witnesses, and to make closing arguments. Employer was given leave and elected to file financial statements with the Board following the

[1] Unless otherwise indicated, all section references are to Title 8, California Code of Regulations.

hearing.[2]

On February 14, 2005, the ALJ issued a decision, denying Employer's appeal and assessing a civil penalty of $12,600.

The Board on its own motion took the ALJ's decision under reconsideration on March 14, 2005. Subsequently, Employer filed a response to the Order of Reconsideration on April 14, 2005 and the Division filed a response to the Order of Reconsideration on April 18, 2005.

EVIDENCE

An employee of Employer sustained a serious injury to his arm and fingers when a rock conveyor moved unexpectedly. The electrical power source to the belt was off but movement of the belt was not blocked. Employer stipulated to the violation and the only issue was the propriety of the penalty proposed by the Division. Since Employer did not dispute the serious violation caused a serious injury, the base penalty was $18,000. Under the Division's regulations, no credit is available for good faith, history, or probability of abatement when a serious violation causes serious injury. As authorized by the regulations, a 30% reduction in penalty was allowed because Employer only employed 23 people at the time of the violation.

Fred Wells, Employer's president, asserted that the quality of Employer's safety program warrants consideration for relief from the proposed penalty. He testified that Employer provides four-hour training sessions before his employees' start, a rarity among employers. He described safety meetings conducted weekly in his shop that addressed any safety problems. If any problems are identified, they are corrected. When his employees work away from the office, he makes daily or biweekly visits to those sites, applying his 40-years' experience, and providing a high degree of presence to his workers. He opined that he is more involved than other business owners.

Wells added that he stays current on safety programs, regardless of whether his workers are performing the particular type of work at the time. Wells contends that paying the monetary penalties would divert ("take away") funds that could be better directed toward employee safety. He testified that the best use of the money from proposed penalties would be to expand training and prevent future problems.

Wells noted, and the Division agreed, that safety conditions at the site were "quite good" and that most of the management and employees were safety oriented, with no morale problems. Wells testified that he has much experience, and has built and changed many conveyors. The employees always

[2] Employer's financial documents were admitted and marked as Employer's Exhibits A, B, C, and D.

use a lockout procedure, and the supervisors are usually "on it" encouraging safety harness use. Before the October 24, 2002 events, they had performed ten similar procedures without incident. It was not apparent at the time of the incident that the conveyor belt was capable of moving. Having reviewed the Division's photographs in light of the accident, Wells now acknowledges the problem, which was not apparent before.

Employer submitted a number of financial records in an effort to demonstrate the company would suffer extreme financial hardship if it were required to pay the fine that Employer considered excessive. The United States Department of Labor, Mine Safety & Health Administration had exacted a fine of $55 for the same violation. Moreover, Employer maintained that the fine was punitive in light of its acknowledged good safety program and the money would better serve the needs of Employer and its employees if it were spent on Employer's safety programs.

ALJ DECISION

In deciding that the evidence did not warrant penalty relief and that the $12,600 proposed penalty should be assessed as reasonable, the ALJ framed the analysis as follows – "The only issue to be resolved is whether Employer established financial hardship such that the penalty could be eliminated so the penalty amount could be spent instead on safety and training programs in Employer's workplace."

In analyzing the penalty issues, this Board recognizes that the ALJ in part relied upon a series of Board Decisions issued since 2001, including *Dye & Wash Technology*, Cal/OSHA App. 00-2327, Denial of Petition for Reconsideration (July 11, 2001); *The Bumper Shop, Inc.*, Cal/OSHA App. 98-3466, Decision After Reconsideration (Sept. 27, 2001); *Eagle Environmental, Inc.*, Cal/OSHA App. 98-1640, Decision After Reconsideration (Oct. 19, 2001); *SMA Office Furniture Laminated, Inc.*, Cal/OSHA App. 00-4113, Decision After Reconsideration (Nov. 7, 2003); *DPS Plastering*, Cal/OSHA App. 00-3865, Decision After Reconsideration (Nov. 17, 2003); and *Pacific MDF Products, Inc.*, Cal/OSHA App. 00-2180, Decision After Reconsideration (Feb. 19, 2004).

Although the ALJ appeared to find merit in some of Employer's contentions, the ALJ's decision found that the standards established by the above-cited Board cases precluded financial relief.

ISSUE

Are the criteria and standards for review of penalties established by the Appeals Board since 2001, consistent with the duties and responsibilities of the Board and the purposes of the Act?

I

Board History of Penalty Relief

Pursuant to Labor Code section 6602, adopted in 1973, the Appeals Board has the duty and responsibility to "affirm, modify, and vacate" monetary penalties proposed by the Division, and to "direct other appropriate relief." Labor Code sections 6319(b) and 6600 explicitly provide that employers cited for safety violations may appeal from "the amount of" monetary penalties proposed by the Division.

In the years following the enactment of the provisions noted above, through a series of cases, the Appeals Board articulated the scope of its authority to determine appropriate monetary penalties, where necessary detailing the limits on the authority of the Division.[3] In *Candlerock Restaurant*, Cal/OSHA App. 74-0010, Decision After Reconsideration (June, 5, 1974), the Board, explicitly referencing Labor Code section 6602, stated in part:

> The Occupational Safety and Health Act of 1973 (hereinafter referred to as the "Act") establishes the power in the . . . Appeals Board to review and determine the propriety of a citation or a proposed penalty or both pursuant to California Labor Code section 6602. The *scope of the review*, as designated in said Labor Code section, is total, in that the Board may affirm, modify or vacate the Division's citation or proposed penalty.
> . . .

[3] In the years immediately following passage of the Act, questions did arise regarding the relative powers of the Division and the Appeals Board with regard to penalties. Indeed, some of the statutory provisions detailing the powers of the Division speak of the assessment of penalties and the imposition of penalties. Labor Code section 6319(c) provides that "[t]he director shall promulgate regulations covering the *assessment* of civil penalties under this chapter"; Labor Code section 6317 provides that "[t]he division may *impose* a civil penalty against an employer as specified in Chapter 4 (commencing with section 6423) of this part"; regarding reinspections under Labor Code section 6320, "[i]f the division fails to receive evidence of abatement or the statement within 10 working days after the end of the abatement period, the division shall notify the employer that the additional civil penalty for failure to abate, as provided in Section 6430, *will be assessed*...."

On the other hand, other provisions reference the Division's authority to propose penalties. Under Chapter 7 (Appeal Proceedings) of the Act, "any employer served with a citation or notice pursuant to [Labor Code] section 6317, or a notice of *proposed penalty* under this part...may appeal to the appeals board within 15 working days...with respect to violations alleged by the division, abatement periods, *amount of proposed penalties*, ...(Labor Code § 6600); if an employer fails to timely notify the appeals board that he intends to contest the citation or notice of proposed penalty, "...the citation or notice of *proposed penalty* shall be deemed a final order of the appeals board and not subject to review...." (Labor Code § 6601). And, if an employer timely "notifies the appeals board that he or she intends to contest a citation..., or notice of *proposed penalty* issued under Section 6319...the appeals board shall afford an opportunity for a hearing.... The appeals board shall thereafter issue a decision...*affirming, modifying or vacating the division's citation, order, or proposed penalty, or directing other appropriate relief*." (Labor Code § 6602). [Emphasis added.] With the passage of time and the development of precedent discussed herein, the duties and responsibilities of the Division and the Board were harmonized and the Division accepted the interpretation that it proposed penalties and the Appeals Board determined the assessment.

The legislative intent is plainly manifested; the Division's proposals, in and of themselves, are nothing more nor less than mere proposals. It is the authority which is vested in the Appeals Board that is necessary to transform any proposed penalty into either an enforceable final order or an enforceable decision.

. . .

The statutory intent of the Act is equally clear . . .

The Appeals Board may vacate or modify the amount of the proposed penalty. There are no existing constraints in the Act which restrict or direct the Board's decision-making power. The Board gives due consideration to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer and the history of previous violations. While the Board considers these factors it is not limited by the Act from giving consideration to other factors nor is it required to give any particular weight to any single factor . . .

"[T]he achievement of a just result in each case is the standard by which our deliberations must be guided." [citing *Secretary, U.S. Department of Labor* v. *Nacirema Operating Company*, OSHRC Docket No. 4, February 7, 1972 CCH Employment Safety and Health Guide, Developments 1971-1973, Para. 8306, p. 6522.] [Emphasis added.]

In a long line of cases, including *York Precision Sheetmetal Works*, Cal/OSHA App. 74-149, Decision After Reconsideration (Nov. 7, 1974), *Squaw Valley Development Company*, Cal/OSHA App. 74-167, Decision After Reconsideration (March 18, 1975), *Ferma Corporation*, Cal/OSHA App. 74-917, Decision After Reconsideration (Nov. 12, 1975), and *John Hernstedt Farms*, Cal/OSHA App. 75-437, Denial of Petition for Reconsideration (Apr. 22, 1976), the Board, consistently held that it assessed penalties, while the Division proposed penalties.

The preeminence of the Appeals Board in interpreting and applying the Act and regulations which implement it has long been established. *Limberg Construction*, Cal/OSHA App. 78-433, Decision After Reconsideration (Feb. 21, 1980) held:

To hold that the Appeals Board is bound by regulations adopted by the Director and penalties proposed by the Division would ignore the language of the Labor Code, deny an employer the right of independent review of the Division's proposal, and frustrate the purpose of providing fair and equitable enforcement of the …Act…

In those early years, where the relative responsibilities of the Division

and the employer were being articulated, the Board also recognized that penalties served no legitimate purpose if the employer was out of business. See, *Lefty's Pizza Parlor*, Cal/OSHA App. 74-580, Decision [After Reconsideration] (Feb. 25, 1975) and *Arcade Meats and Deli*, Cal/OSHA App. 76-320, Decision After Reconsideration (Apr. 7, 1978).

Then, in what is considered a seminal case, *Liberty Vinyl Corporation*, Cal/OSHA App. 78-1276, Decision After Reconsideration (Sept. 24, 1980), the Division challenged the Board's authority to reduce a penalty by taking into consideration a criminal fine for a related violation imposed upon the appellant employer by a Court. Responding to the Division's arguments, the Board stated:

> With legislative intent plainly manifested that the Appeals Board is the final arbiter of penalties if the Division's proposals are contested, *and because the Legislature has also entrusted the Appeals Board with a co-equal responsibility of selecting the means of achieving safe and healthful working conditions, selection of a particular remedy for a particular violation in relation to the stated purpose of the Act is peculiarly a matter for its discretion*. There being no restriction upon how the Appeals Board may affirm, modify, vacate or direct other relief in considering penalties de novo, it is consistent and reasonable to conclude that *the Appeals Board has full discretion in establishing the final monetary penalty necessary to encourage elimination of safety and health hazards provided that such discretion is consistent with the Act. Regulations and criteria are not warranted and are inappropriate for the exercise of such discretion*. To hold as the Division wishes would deny rational practical analysis of the Act and would subvert the purpose and policy of the Act in providing an employer *the right of independent review* of and, where appropriate, relief from the Division's proposal.
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> . . .
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> *If a proposed penalty is in issue at a hearing, evidence relevant to the reasonableness of the proposed penalty shall be considered* if appropriately presented by the parties. [Emphasis added.]

By the 1980's, the dichotomy between the authority of the Board and the authority of the Division was basically accepted. Subsequent cases merely refined ways in which the powers of the Board would be exercised.

As the following wide range of cases demonstrates, the Appeals Board long recognized that the review of penalty amounts proposed by the Division was not limited to a review of whether the Division had properly calculated the

percentages in its complex proposed penalty regulations. Rather it is incumbent on the Appeals Board, as part of the ordinary exercise of its statutory duties and responsibilities, to determine whether the proposed amounts, based on a variety of circumstances, exceed the levels necessary to accomplish the purposes of the Act. An employer's *ability to pay* is simply one of the relevant considerations in determining an appropriate penalty the Board should assess.

The Board has, for example, reduced penalties after determining that the reduced amount was all that was necessary to encourage employers to seek out and eliminate hazardous conditions and maintain safe and healthful work places. (See, e.g., *T.M.C. Construction Co., Inc.*, Cal/OSHA App. 85-741, Decision After Reconsideration (Oct. 26, 1987) and *Mladen Buntich Construction Co.*, Cal/OSHA App. 85-1668, Decision After Reconsideration (Oct 14, 1987).) It has reduced penalties when multiple fines might be punitive and inconsistent with the spirit of the Act. (*Anresco, Inc.*, Cal/OSHA App. 90-855, Decision After Reconsideration (Dec. 20, 1991), pp. 3-4) The Board also held that there is no reason to assess multiple, duplicative penalties if one abatement method would correct the condition and encourage work place safety. (See *Pace Arrow, Inc.*, Cal/OSHA App. 78-1016, Decision After Reconsideration (Nov. 19, 1984), p. 3; *Napa Pipe Corporation*, Cal/OSHA App. 90-143, Decision After Reconsideration (Apr. 18, 1991), p. 3; *Anresco, Inc.*, *supra*; *Strong Tie Structures*, Cal/OSHA App. 75-856, Decision After Reconsideration (Sep. 16, 1976), pp. 2-4 [Board reconsidered and reduced penalties on its own motion.]; and *W.F. Scott & Co., Inc.*, Cal/OSHA App. 95-2623, Decision After Reconsideration (Oct. 29, 1999).

Until 2001, Board precedent had established that its authority to assess penalties is independent and distinct from the Division's right to propose them. (*Supra*, and see *Capri Manufacturing Co.*, Cal/OSHA App. 83-869, Decision After Reconsideration (May 17, 1985); and *Associated Ready Mix*, Cal/OSHA App. 95-3794, Decision After Reconsideration (Dec. 6, 2000) - its function is not to simply adhere to the Director's regulations, but to exercise discretionary authority to adopt, modify, or set aside the penalties proposed by the Division.)

Recent Precedent

Although the controlling legislation was unchanged, beginning in 2001, the Appeals Board, through a series of decisions, established increasingly restrictive conditions and consistently declined to exercise its statutory responsibility to afford "other appropriate relief" with regard to civil penalties. Whereas the Board, during its first 27 years exercised its discretion to best effectuate the remedial purposes of the Act, in our view, the 2001 Board issued decisions based upon a punitive policy toward employers and a faulty view of the law.

In July 2001, in a decision without a hearing record,[4] ***Dye & Wash Technology,*** *supra*, Cal/OSHA App. 00-2327, Denial of Petition for Reconsideration, (July 11, 2001) departing from **27 years** of established precedent, the Board held that:

> Penalties may be eliminated for financial hardship only if an employer can show that the assessment of <u>any</u> penalty will force it out of business or 'will create a substantial likelihood' of doing that. Penalty reductions may only be granted in instances where an employer can show that: (1) Assessment of the full amount of the total proposed penalty would jeopardize its ability to continue operating while maintaining and improving employee safety and health at its place(s) of employment; (2) The employer has abated all of the violations upon which the penalties are based and has otherwise demonstrated a sincere commitment to employee safety and health; and, (3) The employer is unable to pay the proposed penalty in installments spread over a period of time reasonable to the circumstances.
> Even if financial hardship is established, it will only act as an inducement to the reduction of penalties if an employer can establish that it has a long history of providing safe employment and a dedicated commitment to employee safety and health.

In reviewing *Dye &* Wash and the cases that followed, it is not our intention today to question the penalties assessed by the Board in cases that are now final. We do, however, question the rationale used and the rigid universal requirements that emerged from those cases. Moreover we note, that although the Board sought to cloak its *Dye &* Wash ruling in earlier Board precedent, the reasoning in the decision constituted a dramatic departure from earlier cases and the rationale therefore.

In *Dye &* Wash, *supra*, the Board cited *Specific Plating Co., Inc.*, Cal/OSHA App. 95-1607, Decision After Reconsideration (Oct. 15, 1997), and *Linsey Fashion*, Cal/OSHA App. 96-2695, Decision After Reconsideration (April 18, 2001) as its authority. *Specific Plating, supra*, however, did not radically shift the Board's analysis of its statutory authority or the manner in which it would exercise discretion. The Board held: "The Board may reduce the penalties so that they are reasonable and accomplish the statutory purposes and policies of the Act." *Specific Plating* merely held that all penalties should not be reduced to zero unless payment of any penalty would force the employer out of business. We reject the analysis that suggests *Specific* Plating supports the *Dye &* Wash line of cases and the list of rules they established as prerequisites for this Board exercising it statutory authority.

[4] The matter involved a petition from an ALJ Order approving a settlement, so it involved no evidentiary hearing.

From 2001 until the present day, with each subsequent decision the list of requirements grew, rendering the concept of penalty adjustment practically illusory. The Board ultimately required that to obtain relief an employer must establish that:

> (1) Assessment of the full amount of the total proposed penalty would jeopardize an employer's ability to continue operating while maintaining and improving employee safety and health;
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> (2) Employer has abated all violations[5];
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> (3 Employer is unable to pay the proposed penalty in installments spread over a period of time reasonable to the circumstances[6];
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> (4) Employer has established evidence of a long history of providing safe employment and a dedicated commitment to employee safety and health; and,
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> (5) The claimed financial hardship is related, both in time and costs incurred, to correcting those [the appealed] violations.

The principal Board cases where these standards are set forth are *The Bumper Shop, Inc.*, Cal/OSHA App. 98-3466, Decision after Reconsideration (Sept. 27, 2001); *Eagle Environmental Inc.*, Cal/OSHA App. 98-1640, Decision After Reconsideration (Oct. 19, 2001); *DPS Plastering, Inc.,* Cal/OSHA App. 00-3865, Decision after Reconsideration (Nov. 17, 2003) and *Pacific MDF Products, Inc.* Cal/OSHA App 00-2180, Decision After Reconsideration (Feb. 19, 2004).

In *DPS Plastering, Inc.*, *supra*, one of the final cases that established limiting penalty relief criteria, the Board created an even more imposing policy intended to bind the Board and its Administrative Law Judges in future decisions by stating: "we find that, as a matter of public policy, only under extraordinary circumstances should the Board deviate from penalty amounts calculated pursuant to criteria and formulae contained in the Director's penalty regulations. [emphasis added]"….In *DPS*, the Board came close to opining that the Board had no equitable or discretionary powers at all because the Division's penalty setting regulations were presumptively reasonable and could not be disregarded. Then the Board set forth new standards, which made it difficult if not impossible for anyone to overcome the presumption. The Board also gave such weight to safety history as to effectively deny new employers

[5] It must be noted that, pursuant to the statutory and regulatory scheme, the legal duty to abate an alleged violation does not arise until an employer's appeal is adjudicated. Thus, in order to obtain financial relief, an employer had to do what the law did not require.

[6] As noted below, even if Employer were able to make payments through installment plans, Board decisions radically limited the availability of such plans.

relief. Aging sole proprietor or small business employers, with proof of no money and in dire physical health were denied relief due to their inability to meet all the standards established by the Board.

In addition to establishing rules for penalty reduction, the Board also developed "new" requirements regarding installment payment plans. In early 2003, the Board held: "In cases pending disposition before the Board, there must be a sufficient showing by an employer to support a proposed plan or request for payment of penalties over time." (*P & L Marble (West), Inc.*, Cal/OSHA App. 01-3212, Denial of Petition for Reconsideration (Jan. 9, 2003).) The Board then held that the type of evidence an employer must produce to obtain installment penalty relief must be comprised of "sufficient documented evidence" which "is fair to all parties". (*Big Valley Lumber Co.*, Cal/OSHA App. 01-2189, Decision After Reconsideration (Jan. 30, 2003).)

The Board further limited the availability of payment plans. In *DPS Plastering, Inc.*, *supra*, the Appeals Board held that "[a]llowing a payment plan is an intermediate form of penalty relief," and that installment plans cannot be afforded to employers unless they offer "credible" evidence to prove all of the following as well as the general *Dye & Wash* conditions:

> 1. Revenue and Expenses. Financial information must be presented at the time of the request, supported by documentation, showing monthly revenue and expenses for the previous year up to the current month. Since the requested relief is prospective in nature and is for payment of a previous violation, the financial information must provide both historical and current information.
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> 2. Time Period for Payment. The requested period of time must be reasonable to the circumstances. (See *Dye & Wash, supra*.) The time period for repayment should not render the consequences to violations so remote in time to the occurrence of the violation.
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> 3. Amount of periodic payment. The amount proposed by the employer must be reasonable to the circumstances considering the following: total amount of penalties, financial condition of the employer; size of the employer, abatement efforts for violations, and number of payments proposed by the employer.

After issuance of the *DPS* installment payment plan standards (Nov. 2003), the Appeals Board effectively stopped authorization of any installment plans. Administrative Law Judges were essentially stripped of discretion to authorize reasonable payment plans or reduce penalties where circumstances compelled such reductions.

II
The Appropriate Standard

The Board finds that application of the standards set forth in *Dye & Wash* and its progeny does not serve the purposes of the Act. Contrary to the *Dye & Wash proponents*, we opine that those standards have resulted in an abrogation of the Board's statutory authority and have handicapped the ability of the Division and employers to fashion appropriate resolution of cases in furtherance of the purposes and policies of the Act. For that reason, in addition to reversing the holdings in the *Dye & Wash* line of cases, this Board expressly rejects their rationale that penalty relief may be granted only upon proof of the existence of "extraordinary circumstances".

When the Board set an arbitrary and nearly insurmountable "extraordinary circumstances" standard for obtaining penalty relief in the *DPS* (supra) decision, it established a higher threshold of proof requirement. The Board in essence concluded that in exercising its discretion on penalty relief, "all penalties are presumptively reasonable and cannot be disregarded" and that to grant relief, proof must be provided to establish that an "extraordinary circumstance" existed. In so doing, the Board created an evidentiary burden of proof that had to be met by employers contrary to Regulation sections 361.3 and 376.2 and Labor Code section 6600[7]. That position is inconsistent with legions of Board decisions holding that the burden of proof in Cal/OSHA cases requires but a preponderance of the evidence which is usually defined as "such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth." (1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions §35, p.184)

For the foregoing reasons and others heretofore and hereinafter stated, we disagree with the criteria established in *Dye & Wash and its progeny and hold that u*pon consideration of the intent of the Act and the history of decisions supporting that intent, we must reassert the Board's discretionary authority pursuant to Labor Code section 6602 in the assessment of penalties. Labor Code section 6300 states that the California Occupational Safety and Health Act of 1973 is directed at "assuring safe and healthful working conditions . . . by . . . encouraging employers to maintain safe and healthful working conditions. . . ." That has been and continues to be the statutory basis for penalty assessment set forth in the 1973 Cal/OSHA Act. Accordingly, this Board reaffirms the principles articulated in *Candlerock, Liberty Vinyl, Lefty's Pizza Parlor*, and the whole panoply of cases that recognize the authority

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[7] Section 361. 3; Issues on Appeal, "Only the reasonableness of the proposed penalty"; 376.2; "The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. ….. "; Labor Code section 6600: "Any employer …may appeal.. amount of proposed penalties."

of the Board, and its Administrative Law Judges to fashion appropriate relief.

Guidelines

We hold that the Appeals Board, in specific circumstances, using reasonable discretion may reduce proposed penalties that exceed the levels necessary to encourage employers to seek out and eliminate hazardous conditions and maintain safe and healthful work places. (*T.M.C. Construction Co., Inc.*, *supra*; and *Mladen Buntich Construction Co.*, *supra,* The Board may also reduce or eliminate penalties that are shown to be purely punitive or not consistent with the spirit or intent of the Act. (*Anresco, Inc.*, *supra.*))

Consistent with these principles, the Board can reduce or eliminate a proposed penalty due to proven financial distress. (*Veterans in Community Service*, Cal/OSHA App. 96-624, Denial of Petition for Reconsideration (Sept. 24, 1997); *Paige Cleaners*, Cal/OSHA App. 96-1144, Decision After Reconsideration (Oct. 15, 1997); and *Specific Plating Co., Inc.*, *supra*)

That an employer's financial hardship is not attributable solely to safety expenditures does not operate to automatically rule out granting penalty relief. Historically, the Board's focus was on what penalty amount, based on the circumstances of a particular case, serves the purposes of the Act. In some cases, an employer's distressed financial condition may warrant assessing a lower penalty amount to induce safety efforts and future compliance than would be the case if the same employer were not under such hardship. Such economic factors should not therefore be disregarded as irrelevant to the issue of "reasonableness of the proposed penalty."

Hereinafter, each application for penalty relief presented to this Board shall be decided on the merits of each case as presented, and, the Appeals Board may assess penalties as the facts of the case warrant. In each case, Administrative Law Judges for the Board, or the Board itself, must determine whether the evidence rebuts the presumption that the penalties proposed/assessed by the Division are reasonable. The weight given to such evidence or components of the evidence should be determined on a case by case basis, although the trier of fact must always be mindful of certain basic principles, such as whether the penalty ultimately imposed furthers the remedial purposes of the Act, or whether it strikes an appropriate balance between punishment and remediation. There is no fixed formula for making that determination.

Factors such as the cost of correcting unsafe practices may be considered as mitigating factors in assessing penalties depending upon the evidence presented in each case. The California Occupational Safety and Health Act of 1973 (Labor Code section 6300 and following) is intended to

assure safe and healthful working conditions by encouraging employers to maintain safe and healthful working conditions. This Board holds that correction of unsafe working conditions should be encouraged, and punishment as the sole inducement for change is disfavored.

Similar principles guide the Board and its Administrative Law Judges in determining whether an installment payment plan will effectuate the purposes of the Act. The burden of proof is on the employer requesting financial relief and an installment payment program. Each applicant shall present sufficient factual information to enable an ALJ or the Board to make a proper decision. The ALJ shall exercise discretion in determining the adequacy of necessary information to permit granting of financial relief and/or an installment payment program. The requested period of time must be reasonable under the circumstances. The Board or the ALJ shall determine whether the requested time period is reasonable based on the facts of each case such as: the employer's conduct in addressing worker safety; the installment payment amount in relation to the total penalty amount; the employer's financial condition; the size of the employer; abatement and continuing efforts to correct violations and maintain a safe work environment, and number of payments.

DECISION AFTER RECONSIDERATION

Guided by this Board's historical interpretation of Labor Code sections 6300, 6302, 6602 and 6619 that existed for 27 years prior to 2001, this Board is obligated by law to follow the Legislative intent established within those sections.

We therefore reverse the decision of the ALJ in this case and disapprove the criteria set forth in the cases upon which the decision is based. The Board recognizes it has a duty and responsibility to grant penalty or other relief, as appropriate.

The Decisions After Reconsideration issued by this Board beginning with *Dye & Wash and others cited, are* specifically disapproved on the issues of new criteria and requirements for penalty relief and installment payment plans set forth in those cases.

In its petition, Employer only challenged the propriety of the civil penalty. The existence and classification of the violation are established by operation of law.[8] The only issue to be resolved is whether Employer established financial hardship or otherwise stated grounds to warrant the Board's exercise of its

[8] An issue not properly raised on appeal is deemed waived. See Section 361.3, "Issues on Appeal;" *Western Paper Box Co.*, Cal/OSHA App. 86-812, Denial of Petition for Reconsideration (December 24,1986); *California Erectors, Bay Area, Inc.*, Cal/OSHA App. 93-503, Decision After Reconsideration (July 31, 1998); and *Delta Excavating, Inc.*, Cal/OSHA App. 94-2389, Decision After Reconsideration (August 10, 1999).

Labor Code section 6602 authority to modify or vacate the proposed penalty, or direct other appropriate relief.

Based upon the review of the record, the Board concludes that Employer has demonstrated it is in financial distress. Although payment of the penalty would not require its closure, Employer has shown a willingness to continue providing more safety measures than those called for in the citations. That is an important indication of future conduct and compliance with safety regulations that is consistent with this decision. Such efforts are to be rewarded not punished: *Lefty's Pizza Parlor* and its progeny [e.g., *Arcade Meats and Deli*, supra; *Liberty Vinyl Corp.*, supra; *Veterans in Community Service*, supra; *Paige Cleaners*, supra; and *Specific Plating Co., Inc.*, Cal/OSHA App. 95-1607, supra (Oct. 15, 1997).]

Upon remand, Employer will be given an opportunity to present additional evidence regarding factors deemed relevant herein.

ORDER

The cases relied upon in this case by the ALJ in finding that penalty relief was not appropriate are disapproved and hereby reversed.

This case is remanded to the Hearing Operations for a hearing on the issues raised herein and for a determination of the appropriate penalty amount. The guidance provided by this decision and the specific disapproval of prior decisions identified herein shall be applied by the trial ALJ to the facts of this case. Penalties may be modified or reasonable installment payment schedules may be structured in accordance with the parameters of this decision.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: March 27, 2006